JONES v. CHURME AND MOREIRA.

[Orig. Civ. Juris. (Taylor, J.) May 24, 1951]

[Selangor — Divorce No. 5 of 1950]

Divorce — Evidence in divorce — Application of English law — Evidence of spouse as to non-access.

In divorce proceedings admissibility of evidence bearing directly on the relief claimed is governed by the law of England and the operation of the Evidence Ordinance is, to that extent, modified.

A spouse may not give evidence of non-intercourse during the marriage to bastardise a child born in wedlock.

Russell v. **Russell**,(1) applied.

Case referred to :—

(1) *Russell v. Russell* (1924) A.C. 687.

PETITION FOR DIVORCE.

K. L. Devaser for the petitioner.

Respondent and Co-respondent in person.

Cur. Adv. Vult.

Taylor, J. : — This was a petition by a husband for dissolution of marriage on the ground of adultery between the wife and the co-respondent. It was proposed to prove the adultery by proving that the wife had borne a child at a period when the husband had no access to her. Counsel sought to question the petitioner with a view to shewing non-access by his own evidence. The Court stopped the question and called upon Counsel to shew that such evidence is admissible in this country and, at the request of Counsel, granted an adjournment to enable him to consider the matter. On the resumption, Counsel said that he could find no authority either way and did not wish to argue the point. He formally tendered the evidence and said that if the Court ruled it inadmissible he would drop the matter and seek to prove the adultery by other means.

The Divorce Enactment (Cap. 9) provides that "the Court shall act and give relief on the same principles as apply in England." If the law of evidence were materially different it might easily happen that the substantive relief sought could not be given because the necessary facts could not be proved. I am therefore, of opinion that the rule in *Russell v. Russell*(1) applies in the Federation.

I do not mean to say that the Evidence Ordinance is excluded so that all questions of admissibility arising in a divorce suit must be decided by the English law. On the contrary, I think that the Evidence Ordinance is generally applicable and that where it is required to prove a fact, such as a birth of a marriage, which might be equally material in other types of action, the evidence of such a fact must be regulated by the Evidence Ordinance. But where, as here, the fact to be proved bears directly on the basis of the divorce proceedings the admissibility of the evidence of that fact must be decided according to English law and the Evidence Ordinance is, to that extent, modified.

I would add, though my judgment is in no way dependent on this further consideration, that the reasons for the rule in the *Russell* case, as explained by Lord Dunedin at pp. 722, 725, *et seq*, apply even more strongly in this country, where many of the parties appear in person, than in England. Such evidence, and the cross-examination on it, if admitted, would very soon make it necessary to adopt the rule, either by practice or by legislation if (contrary to my view) it is not already applicable.

Order accordingly.

The Rule in *Russell v. Russell* is no longer law of England. It was abolished by section 7 of the Law Reform (Miscellaneous Provisions) Act, 1949 which was subsequently incorporated in the Matrimonial Causes Act, 1950. (Ed. M.L.J.).

BATES v. BATES.

[Orig. Civ. Juris. (Taylor, J.) May 26, 1951]

[Selangor — Divorce Suit No. 4 of 1950]

Divorce — Evidence of change of domicil.

An immigrant husband was said to have expressed an intention to settle in Malaya. **Held** that these words did not shew an intention to settle in the State in which he then resided. **Hickson** v. **Hickson**,(1) discussed and held not to be an authority.

Cases referred to :—

(1) *Hickson v. Hickson* (1934) F.M.S.L.R. 318, (1935) F.M.S.L.R. 140; (1935) M.L.J. 265 (C.A.).

(2) *Winans v. Attorney-General* (1904) A.C. 291.

PETITION FOR DIVORCE.

K. K. Benjamin for the petitioner.

Respondent in person.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — This is a wife's petition for dissolution of her marriage which took place in Seremban about three years ago; both parties were then in their early twenties; the husband was a non-commissioned officer in the army, stationed in Negri Sembilan and admittedly domiciled in England at that time; the bride was a locally-born girl, originally domiciled in Malacca. Some months later the husband was demobilised; he elected to take his discharge locally instead of returning to England and he obtained employment